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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Marisol Villalobos Mercado,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.  
15

No. CV-20-00423-PHX-DJH

**ORDER**

16 At issue is the denial of Plaintiff Marisol Villalobos Mercado's Applications for  
17 Disability Insurance benefits and Supplemental Security Income benefits by the Social  
18 Security Administration ("SSA") under the Social Security Act. Plaintiff filed a Complaint  
19 (Doc. 1) with this Court seeking judicial review of that denial, and the Court now addresses  
20 Plaintiff's Opening Brief (Doc. 17, "Pl. Br.") Defendant SSA Commissioner's Response  
21 Brief (Doc. 18, "Def. Br."), and Plaintiff's Reply Brief (Doc. 22, "Reply"). The Court has  
22 reviewed the briefs and Administrative Record (Doc. 13, "R.") and now reverses and  
23 remands the Administrative Law Judge's decision (R. at 19–30).

24 **I. BACKGROUND**

25 Plaintiff filed Applications for Disability Insurance benefits and Supplemental  
26 Security Income benefits on May 12, 2016, for a period of disability beginning on May 7,  
27 2014. (R. at 19.) Her claim was denied initially on August 5, 2016, and upon  
28 reconsideration on December 30, 2016. (R. at 19.) Plaintiff appeared before the ALJ for a

1 hearing regarding her claims on October 25, 2018, which the ALJ denied on January 25,  
2 2019. (R. at 19, 30.) On December 31, 2019, the Appeals Council denied Plaintiff's  
3 Request for Review and adopted the ALJ's decision as the agency's final decision. (R. at  
4 1–3.)

5 The Court has reviewed the medical evidence in its entirety and will discuss the  
6 pertinent medical evidence in addressing the issues raised by the parties. Upon considering  
7 the medical records and opinions, the ALJ evaluated Plaintiff's disability based on the  
8 following severe impairments: rheumatoid arthritis; history of ankle surgery; degenerative  
9 disc disease; torticollis; and knee impairment. (R. at 21.)

10 Ultimately, the ALJ evaluated the medical evidence and testimony and concluded  
11 that Plaintiff was not disabled from the alleged disability onset-date through the date of the  
12 decision. (R. at 30.) The ALJ found that Plaintiff "does not have an impairment or  
13 combination of impairments that meets or medically equals the severity of one of the listed  
14 impairments in 20 CFR Part 404, Subpart P, Appendix 1." (R. at 23.) Next, the ALJ  
15 calculated Plaintiff's residual functional capacity ("RFC"): "[Plaintiff] has the [RFC] to  
16 perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except she:  
17 cannot work around hazards such as moving machinery and unprotected heights; and is  
18 limited to frequent handling and fingering." (R. at 23.) Accordingly, the ALJ found that  
19 Plaintiff can perform jobs that exist in significant numbers in the national economy. (R. at  
20 29.)

## 21 **II. LEGAL STANDARD**

22 In determining whether to reverse an ALJ's decision, the district court reviews only  
23 those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503,  
24 517 n.13 (9th Cir. 2001). The Court may set aside the Commissioner's disability  
25 determination only if it is not supported by substantial evidence or is based on legal error.  
26 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is relevant evidence  
27 that a reasonable person might accept as adequate to support a conclusion considering the  
28 record as a whole. *Id.* To determine whether substantial evidence supports a decision, the

1 Court must consider the record as a whole and may not affirm simply by isolating a  
 2 “specific quantum of supporting evidence.” *Id.* Generally, “[w]here the evidence is  
 3 susceptible to more than one rational interpretation, one of which supports the ALJ’s  
 4 decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954  
 5 (9th Cir. 2002) (citations omitted).

6 To determine whether a claimant is disabled for purposes of the Act, the ALJ  
 7 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of  
 8 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*  
 9 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether  
 10 the claimant is presently engaging in substantial gainful activity. 20 C.F.R.  
 11 § 404.1520(a)(4)(i). At step two, the ALJ determines whether the claimant has a “severe”  
 12 medically determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). At  
 13 step three, the ALJ considers whether the claimant’s impairment or combination of  
 14 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P  
 15 of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is automatically  
 16 found to be disabled. *Id.* At step four, the ALJ assesses the claimant’s RFC and determines  
 17 whether the claimant is still capable of performing past relevant work. 20 C.F.R.  
 18 § 404.1520(a)(4)(iv). If not, the ALJ proceeds to the fifth and final step, where she  
 19 determines whether the claimant can perform any other work in the national economy  
 20 based on the claimant’s RFC, age, education, and work experience. 20 C.F.R.  
 21 § 404.1520(a)(4)(v). If not, the claimant is disabled. *Id.*

### 22 **III. ANALYSIS**

23 Plaintiff raises two issues before the Court. First, Plaintiff argues the ALJ erred in  
 24 rejecting her symptom testimony. (Pl. Br. at 15–22.) Second, Plaintiff argues the ALJ erred  
 25 in assigning partial weight to the opinions of Dr. Donald Fruchtman, a consultative  
 26 examiner, and Dr. Nehad Soloman, Plaintiff’s treating rheumatologist. (Pl. Br. at 22–27.)

27 The Court finds that the ALJ erred in rejecting Plaintiff’s symptom testimony  
 28 because the ALJ provided insufficient reasons for rejecting Plaintiff’s symptom testimony.

1 Second, the Court finds the ALJ did not err in assigning partial weight to Dr. Fruchtmann's  
2 and Dr. Solomon's medical opinions.

3 **A. The ALJ erred in rejecting Plaintiff's symptom testimony by relying**  
4 **solely on Plaintiff's medical evidence.**

5 Plaintiff argues the ALJ erred in rejecting her symptom testimony. (Pl. Br. at 15–  
6 22.) An ALJ performs a two-step analysis to evaluate a claimant's testimony regarding  
7 pain and symptoms. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). First, the ALJ  
8 evaluates whether the claimant has presented objective medical evidence of an impairment  
9 “which could reasonably be expected to produce the pain or symptoms alleged.”  
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007) (quoting *Bunnell v.*  
11 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (*en banc*) (internal quotation marks omitted)).  
12 If the claimant presents such evidence then “the ALJ can reject the claimant's testimony  
13 about the severity of her symptoms only by offering specific, clear and convincing reasons  
14 for doing so.” *Garrison*, 759 F.3d at 1014–15 (citing *Smolen v. Chater*, 80 F.3d 1273, 1281  
15 (9th Cir. 1996)). This is the most demanding standard in Social Security cases. *Id.* at 1015.  
16 “In evaluating the credibility of pain testimony after a claimant produces objective medical  
17 evidence of an underlying impairment, an ALJ may not reject a claimant's subjective  
18 complaints based solely on a lack of medical evidence to fully corroborate the alleged  
19 severity of pain.” *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

20 Here, the ALJ found “that [Plaintiff's] medically determinable impairments could  
21 reasonably be expected to cause the alleged symptoms; however [Plaintiff's] statements  
22 concerning the intensity, persistence and limiting effects of these symptoms are not entirely  
23 consistent with the medical evidence and other evidence in the record for the reasons  
24 explained in this decision.” (R. at 24.)

25 The ALJ did not provide “specific, clear and convincing” reasons supported by  
26 substantial evidence in rejecting Plaintiff's symptom testimony. *See Molina v. Astrue*, 674  
27 F.3d 1104, 1112 (9th Cir. 2012). The ALJ goes into great detail discussing Plaintiff's  
28 medical evidence and makes a short remark that in February 2018, Plaintiff reported 70%  
pain relief from medications and that she had improved function and activities of daily

1 living (“ADLs”) when she took opiates. (R. at 26, 674, 676.) The ALJ does not indicate  
 2 what ADLs Plaintiff might be referring to and provides no further analysis regarding  
 3 Plaintiff’s ADLs. As such, the ALJ has not provided specific, clear, and convincing reasons  
 4 for rejecting Plaintiff’s ADLs.

5 The ALJ’s main reason for rejecting Plaintiff’s testimony—that it was purportedly  
 6 inconsistent with the objective medical evidence—also fails because, even if true, it cannot  
 7 form the sole basis for rejecting a claimant’s testimony. *See Burch*, 400 F.3d at 682. Since  
 8 the Court rejects the ALJ’s other bases for rejecting Plaintiff’s testimony, the ALJ’s  
 9 reliance on the objective medical evidence stands alone, and therefore, is inadequate. As  
 10 such, the ALJ erred in rejecting Plaintiff’s symptom testimony.

11 **B. The ALJ did not err in assigning partial weight to Dr. Fruchtman’s and**  
 12 **Dr. Soloman’s medical opinions.**

13 Plaintiff argues the ALJ erred in assigning partial weight to the opinions of Dr.  
 14 Fruchtman and Dr. Soloman. (Pl. Br. at 22–27.) While “[t]he ALJ must consider all medical  
 15 opinion evidence,” there is a hierarchy among the sources of medical opinions. *Tommasetti*  
 16 *v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Those who have treated a claimant are  
 17 treating physicians, those who examined but did not treat the claimant are examining  
 18 physicians, and those who neither examined nor treated the claimant are nonexamining  
 19 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). “As a general rule, more  
 20 weight should be given to the opinion of a treating source than to the opinion of doctors  
 21 who did not treat the claimant.” *Id.* This is so because treating physicians have the  
 22 advantage of in-person interaction and typically a longer history of treatment than a  
 23 claimant’s other doctors, and their “subjective judgments . . . are important, and properly  
 24 play a part in their medical evaluations.” *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.  
 25 1988).

26 An ALJ “may only reject a treating or examining physician’s uncontradicted  
 27 medical opinion based on ‘clear and convincing reasons.’” *Carmickle v. Comm’r of Soc.*  
 28 *Sec.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Lester*, 81 F.3d at 830–31). “Where such  
 an opinion is contradicted, however, it may be rejected for specific and legitimate reasons

1 that are supported by substantial evidence in the record.” *Id.* An ALJ meets this standard  
2 by “setting out a detailed and thorough summary of the facts and conflicting medical  
3 evidence, stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*,  
4 881 F.2d 747, 751 (9th Cir. 1989).

5 **1. The ALJ provided specific and legitimate reasons for assigning**  
6 **partial weight to Dr. Fruchtman’s opinion.**

7 In July 2014, Dr. Fruchtman performed a consultative examination. (R. at 27, 367–  
8 74.) Dr. Fruchtman noted that Plaintiff had a normal gait, but that she walked as if she was  
9 trying to protect her body and that she seemed to be overexaggerating her discomfort when  
10 she was walking. (R. at 27, 368–69.) Dr. Fruchtman also noted that Plaintiff deferred heel  
11 and toe walking, and Plaintiff reported discomfort when performing various physical  
12 exercises, which led Dr. Fruchtman to state that it seemed Plaintiff was overstating her  
13 discomfort. (R. at 27, 369.) Dr. Fruchtman also expressed that Plaintiff had fibromyalgia  
14 symptoms that were part of the problem and that the rheumatoid arthritis was less acute.  
15 (R. at 27, 370.) Dr. Fruchtman found that Plaintiff’s examination showed decreased  
16 musculoskeletal range of motion throughout her body but no atrophy, slightly positive  
17 straight leg raises, normal reflexes, and hypersensitivity to pinprick. (R. at 27, 371.) Dr.  
18 Fruchtman noted that Plaintiff did not exhibit evidence of significant deformities that might  
19 be expected in someone who has had rheumatoid arthritis for 15 years or significant  
20 synovitis or effusions. (R. at 27, 370–71.) Dr. Fruchtman also opined that Plaintiff could:  
21 lift and/or carry 20 pounds occasionally and less than 10 pounds frequently; stand and/or  
22 walk for four hours and sit six-to-eight hours in an eight-hour workday; and occasionally  
23 climb, stoop, crouch, reach, handle, finger, and feel. (R. at 27, 371–73.)

24 The ALJ gave Dr. Fruchtman’s opinions regarding exertional assessments partial  
25 weight and gave his opinions regarding non-exertional limitations, including limiting  
26 Plaintiff to only occasional manipulative activities, minimal weight because they were not  
27 supported by substantial evidence in the record. (R. at 27.) The ALJ also noted that Dr.  
28 Fruchtman’s own assessment indicated that Plaintiff appeared to be overreacting and

1 exaggerating her symptoms during his examination, which the ALJ relied on in assigning  
2 weight to Dr. Fruchtman's opinions. (R. at 27.)

3 Plaintiff argues the ALJ erred in finding Dr. Fruchtman's opinions were not  
4 supported by substantial evidence in the record. (Pl. Br. at 25.) The Court disagrees. Dr.  
5 Fruchtman noted in his report that Plaintiff overreacted and seemed to exaggerate her pain  
6 levels and abilities. (R. at 368–71.) The ALJ found these findings of overreaction and  
7 exaggeration did not match Dr. Fruchtman's own findings that Plaintiff had pain and  
8 difficulty moving every joint. The ALJ also found that treating sources found that almost  
9 all of Plaintiff's joints were normal. (R. at 807, 815.) As Defendant correctly points out,  
10 Plaintiff refused to stand on her toes with Dr. Fruchtman though she had the ability to do  
11 this normally at many treatment visits. (Def. Br. at 15; R. at 648, 652, 657, 662, 667, 671,  
12 675, 679, 686, 691, 694, 698.) The ALJ provided specific and legitimate reasons for  
13 assigning partial weight to Dr. Fruchtman's opinions because Dr. Fruchtman's opinions  
14 were contradicted by his own medical observations as well as other medical opinions in  
15 the record.

16 **1. The ALJ provided specific and legitimate reasons for assigning**  
17 **partial weight to Dr. Soloman's opinion.**

18 Dr. Soloman is Plaintiff's treating rheumatologist, and her reports indicate  
19 considerable restrictions in Plaintiff's functioning. (R. at 27, 594–98, 642–44, 937–41.) In  
20 June 2016, Dr. Soloman indicated that Plaintiff's active and erosive rheumatoid arthritis  
21 limited her to occasionally lift and/or carry only less than ten pounds, stand and/or walk  
22 less than two hours, and sit one hour total during an eight-hour workday. (R. at 27, 594–  
23 98, 642–44.) In September 2018, Dr. Soloman made similar findings. (R. at 27, 937–41.)

24 The ALJ found that Dr. Soloman's profound degree of restriction was not supported  
25 by an explanation of Plaintiff's medical concerns and that her opinions were not consistent  
26 with substantial evidence in the record, including Dr. Fruchtman's findings that Plaintiff  
27 showed no significant joint deformities or other rheumatoid arthritis-related abnormalities.  
28 (R. at 27–28.) The ALJ also found that Dr. Soloman's progress notes reference x-rays  
showing erosive changes, but that imaging studies showed degenerative disc disease and



1 no erosive changes. (R. at 28.) The ALJ also indicated that Dr. Soloman's own treatment  
2 records showed tenderness and swelling at various joints but no deformities, no crepitus,  
3 no neurological defects, and Plaintiff reported pain relief and improved functioning with  
4 pain medications. (R. at 28, 518–93, 805–936.) For these reasons, the ALJ assigned only  
5 partial weight to Dr. Soloman's opinions.

6 Plaintiff first argues that the ALJ erred in rejecting Dr. Soloman's opinion because  
7 it is error to discount check-box questionnaires as insufficient to support the treating  
8 physician's assessment. (Pl. Br. at 24.) The ALJ does not rely on this as a reason for  
9 assigning partial weight to Dr. Soloman's opinion, however, and relies on other reasons for  
10 discounting the medical opinion.

11 Second, Plaintiff argues the ALJ cherry-picked normal findings from the  
12 examinations and ignored other relevant findings. (Pl. Br. at 24–25.) Dr. Soloman's  
13 treatment notes repeatedly indicate Plaintiff had no deformities and only sometimes had  
14 some tenderness and swelling. (R. at 520, 525, 529, 533, 537, 541, 545, 549, 553, 557, 807,  
15 814–15, 821, 829, 836, 848, 852, 856, 867, 871–72.) Dr. Soloman notes consistently that  
16 Plaintiff had no deformities, which undercuts Plaintiff's argument that the ALJ cherry-  
17 picked normal findings.

18 Finally, Plaintiff argues the record does not support the ALJ's finding that Plaintiff  
19 sustained improvement from medication. (Pl. Br. at 25.) Again, the Court disagrees. The  
20 ALJ discussed throughout the opinion the evidence showing Plaintiff improved with  
21 various treatment methods, indicating sometimes that her treatment provided 50% to 70%  
22 relief. (R. at 25–26, 603, 611, 613, 646, 674, 684, 693.) For example, Plaintiff indicated  
23 physical therapy helped provide her relief. (R. at 603, 611, 613.) Throughout 2017 and  
24 2018, Plaintiff repeatedly said she experienced improvement with medication, as well,  
25 indicating anywhere between 30% to 70% relief with the medication. (R. at 646, 674, 684,  
26 693.)



1 The ALJ provided specific and legitimate reasons for assigning partial weight to Dr.  
 2 Soloman's opinion because Dr. Soloman's own treatment notes contradicted her opinion  
 3 and because Plaintiff showed great improvement with treatment.

4 **C. The appropriate remedy is to remand Plaintiff's case for a new disability**  
 5 **finding.**

6 Plaintiff asks the Court to apply the "credit-as-true" rule, which would result in a  
 7 remand of Plaintiff's case for payment of benefits rather than for further proceedings. (Pl.  
 8 Br. at 27–28.) The credit-as-true rule only applies in cases where three elements are  
 9 present. *Treichler v. Comm'r of Soc. Sec.*, 775 F.3d 1090, 1099–1102 (9th Cir. 2014).  
 10 First, the ALJ must have failed to provide legally sufficient reasons for rejecting medical  
 11 evidence. *Id.* at 1100. Second, the record must be fully developed, there must be no  
 12 outstanding issues that must be resolved before a determination of disability can be made,  
 13 and the Court must find that further administrative proceedings would not be useful. *Id.* at  
 14 1101. Further proceedings are considered useful when there are conflicts and ambiguities  
 15 that must be resolved. *Id.* Third, if the above elements are met, the Court may "find[] the  
 16 relevant testimony credible as a matter of law . . . and then determine whether the record,  
 17 taken as a whole, leaves 'not the slightest uncertainty as to the outcome of [the]  
 18 proceeding.'" *Id.* (citations omitted).

19 In this case, the ordinary remand rule, not the credit-as-true rule applies. First, as  
 20 previously discussed, the ALJ provided legally insufficient reasons for rejecting symptom  
 21 testimony. Nevertheless, because the ALJ did not correctly evaluate Plaintiff's symptom  
 22 testimony, this case still presents evidentiary ambiguities that must be resolved. The ALJ  
 23 erred in evaluating Plaintiff's ADLs and considering them with Plaintiff's symptom  
 24 testimony, so it is unclear how Plaintiff's symptom testimony might impact the ALJ's  
 25 overall finding of Plaintiff's disability.


26 Accordingly, the Court applies the ordinary remand rule and will remand this matter  
 27 for further development of the record and a new disability determination.

28 **IT IS THEREFORE ORDERED** reversing and remanding this matter to the  
 Social Security Administration for further proceedings consistent with the Order.

1 Specifically, the ALJ must consider Plaintiff's symptom testimony.

2 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly  
3 and close this case.

4 Dated this 29th day of April, 2021.

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8 Honorable Diane J. Humetewa  
United States District Judge  
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